86-973

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SOUTH RANCH OIL COMPANY, INC.,
Petitioner,

vs.

SEISMIC INTERNATIONAL RESEARCH CORP.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Where the Court of Appeals has totally misconstrued the district court's ruling directing a verdict on a claim admittedly supported by credible evidence and has refused to review the district court's action because of petitioner's failure to challenge nonexistent district court rulings and failure to brief issues not presented by the record, should this Court in the exercise of its supervisory power remand the case to the Court of Appeals to "satisfy the appearance of justice"?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

South Ranch Oil Company, Inc., defendant and counterclaimant in the action below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit filed June 3, 1986.[1]

OPINIONS BELOW

The opinion of the Court of Appeals, filed on June 3, 1986, is reproduced in Appendix A and reported at 793 F.2d 227. The Order of that court denying rehearing, dated September 18, 1986, is reproduced in Appendix B.

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[1] Petitioner South Ranch Oil Company, Inc. has no parent corporation, subsidiaries (other than wholly owned subsidiaries) or affiliated corporations, within the meaning of Rule 28.1 of this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 1986, and a timely petition for rehearing was denied on September 18, 1986, one judge dissenting. This petition was filed within 90 days of September 18, 1986. The jurisdiction of this Court is founded upon 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Respondent Seismic sued Petitioner South Ranch in the Western District of Oklahoma for failure to pay for certain seismological services allegedly rendered by Seismic in connection with oil and gas exploration. South Ranch counterclaimed for nonperformance by Seismic and, in an amended counterclaim, alleged that Seismic had bribed South Ranch's agent who was principally involved in the transaction and sought damages for inducing a breach of his fiduciary duties.

The evidence at trial showed that Norman Stafford, an employee of South Ranch, was the on-the-scene representative of South Ranch charged with monitoring the performance of Seismic and with approving the payment of Seismic's invoices. On August 28, 1980 — at a time when Seismic was behind in its work under the agreement — Seismic secretly paid Stafford $28,000, which was equal to one-half of his yearly salary. Within days, Stafford approved for payment a Seismic invoice in the amount of $190,000, even though Seismic was behind schedule and over budget. The evidence showed that this billing was for work that was not done and that Stafford generally accepted nonconforming work from Seismic.

Although Seismic disputed the purpose and illegality of the payment, a jury question was clearly presented on the counterclaim under Section 312 of the Restatement of Agency

and the common law of fiduciary duty.[2] The trial judge first apparently agreed that a submissible case had been made but then, inexplicably, refused to instruct the jury on the counterclaim, citing the insufficiency of the evidence.[3]

On appeal from a verdict for Seismic, the Tenth Circuit affirmed the dismisal of the counterclaim for reasons never mentioned at trial or in the briefs and based on a total misconception of the record. The Tenth Circuit found that South Ranch had failed to comply with local Rule 14 of the district court by supposedly failing to file suggested jury instructions on its counterclaim three days before trial as allegedly required by that rule. It misconstrued a later order relating to supplemental instructions as being the basis for the directed verdict. The court chastised South Ranch for not discussing local Rule 14 in its briefs, even though the district court had not relied on local rule 14 in refusing to submit the claim and Seismic had not attempted to defend the judgment on that basis. The court then said:

> "Counsel's failure to focus on the reasons why the trial court denied the requested instructions leaves us without a basis for assigning error to the trial court's decision."

The Court of Appeals therefore refused to consider the sufficiency of the evidence on South Ranch's counterclaim or the propriety of the trial court's refusal to instruct on that claim and effectively dismissed South Ranch's appeal. It did so despite the facts that: (a) local Rule 14 of the Western District of Oklahoma

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[2] Section 312 provides:

> "A person who, without being privileged to do so, intentionally causes . . . an agent to violate a duty to his principal is subject to liability to the principal."

[3] The court did not actually grant a motion for directed verdict but simply refused to give the jury any instructions on the fiduciary duty claim, which was the precise equivalent of a directed verdict.

has nothing whatsoever to do with the filing of proposed instructions; (b) proposed instructions on the counterclaim were in fact filed well in advance of trial; (c) the trial court never relied on Rule 14 or the supposed lack of instructions; and (d) the Court of Appeals itself noted elsewhere in its opinion that the counterclaim "was supported by 'credible evidence' " (Appendix A, pp. A9-10).

South Ranch pointed out these egregious errors in a petition for rehearing. Circuit Judge Logan indicated his willingness to reconsider the matter, but Circuit Judge McKay and District Judge Crow, sitting by designation, voted to deny rehearing, and the Court en banc refused to hear the case.

REASONS FOR GRANTING THE WRIT

The Court of Appeals Denied Petitioner the Right of Appellate Review on Grounds So Untenable as To Lack Even the Appearance of Justice.

Although the issues in this case do not at first blush conjure up the spectre of certiorari or seem worthy of this Court's attention, the bewildering manner in which this appeal was treated by the Tenth Circuit should be of substantial concern to this Court as the overseer of the federal judicial system. Something went radically askew here and produced a result that defies description and leaves the parties wondering about the integrity of the process. The right of appellate review guaranteed by Congress has been emasculated by judicial sleight-of-hand.

The Court of Appeals' mishandling of this case is so clear and its mistakes so obvious that they are susceptible to a quick remedy. This petition should be granted, the judgment below summarily vacated, and the case remanded with instructions to consider petitioner's appeal on the merits. This Court has frequently entered similar orders in the past when confronted with fundamental legal or factual mistakes by a lower appellate court. *Oregon v. Mathiason,* 429 U.S. 492 (1977); *Chase Manhattan Bank v. South Acres Development Co.,* 434 U.S. 236 (1978); *United States v. Woodward,* 469 U.S. 105 (1985); *Smith v. Illinois,* 469 U.S. 91 (1985).

The two elementary errors of the Court of Appeals almost defy credulity and take on an even darker cast in light of the court's refusal to acknowledge those mistakes when confronted with them in the petition for rehearing. In the first place, the local rule of the district court which the Court of Appeals found to have been violated says nothing about the need to file any in-

structions.[4] The trial court at no time invoked Rule 14 as a basis for refusing to submit South Ranch's counterclaim to the jury, which accounts quite understandably for the parties' failure to discuss Rule 14 in their appellate briefs. The district court ruled that the evidence was insufficient to support the claim — a determination that is clearly in error — and the Court of Appeals simply ducked the issue by the invocation of a totally extraneous local rule.[5]

Secondly — and perhaps even more shockingly — the record is crystal clear that South Ranch filed its proposed instructions on the breach of fiduciary duty claim on March 8, 1983, three weeks before the beginning of the trial on March 28.[6] At a later date South Ranch attempted to supplement these instructions, and the trial court refused to consider the supplemental instructions for an alleged failure to file a brief as supposedly required by local Rule 14. At no time did the trial court rule or even suggest that the original instructions were tardy or that the claim was jeopardized because of any irregularity in filing proposed instructions.

The Court of Appeals thus misconstrued the district court's order as imposing sanctions on South Ranch for the supposed violation of a local procedural rule, and refused to consider the

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[4] Local Rule 14 of the Western District of Oklahoma is attached as Appendix C, *post* p. A13.

[5] This result was further flawed because of its disregard for prior Tenth Circuit precedent *requiring* jury consideration of any pleaded claim when the proponent of that claim makes a submissible case. *Chavez v. Sears, Roebuck & Co.*, 525 F.2d 827 (10th Cir. 1982); *Tyler v. Dowell*, 274 F.2d 898 (10th Cir. 1960).

[6] Attached as Appendix D is a copy of defendant's proposed instructions on the fiduciary duty claim, bearing a file-stamped dated of March 8, 1983.

propriety of that action on the basis of alleged procedural error, without weighing any of the criteria for sanctions established by *Societe Internationale v. Rogers,* 357 U.S. 197 (1958), and its progeny. Recently these elements were summarized by the Third Circuit in *Poulis v. State Farm Fire & Cas. Co.,* 747 F.2d 863 (3d Cir. 1984) to include: (1) the extent of the party's personal responsiblity for the failure; (2) the prejudice to the adversary caused by the failure; (3) whether the disobedient party exhibited a history of dilatoriness; (4) whether the conduct of the disobedient party or the attorney was willful or in bad faith; (5) the availability of alternative sanctions; and (6) the merit of the claim or defense.

Any even-handed appraisal of these factors would indicate that the punishment here far exceeded the "crime," even assuming there was a "crime." The Tenth Circuit in this very case indicated that it knew how to weigh and balance these criteria in adjudicating a motion for sanctions (Appendix A, pp. A5-6), but it summarily dismissed the appeal on South Ranch's counterclaim without any attempt to balance the hardships, without any consideration of lesser sanctions, and without any finding of bad faith or persistent disobedience. Adding to the irony was the fact that elsewhere in its opinion the Tenth Circuit acknowledged the strength of the evidence on South Ranch's counterclaim by refusing to award sanctions to Seismic for a groundless claim. It characterized Seismic's challenge to the fiduciary duty claim as "patently flawed," and further stated that:

> "Even though procedural errors of SROC's counsel kept SROC from pursuing this claim at trial . . ., the claim was supported by 'credible evidence.' " (Appendix A, pp. A9-10).

* * * *

We readily acknowledge that this Court does not sit merely to correct errors. But more than mere error is at stake here. The right of a litigant to meaningful, impartial review of the

dismissal of its case has been abrogated for reasons that cannot bear even the slightest scrutiny. In *Proctor v. Warden,* 435 U.S. 559, 560 (1978), this Court summarily reversed a federal appellate court which had made a fundamental factual error in ruling on the appeal below, saying:

> ". . . it is not enough that a just result may have been reached. '[T]o perform its high function in the best way "*justice must satisfy the appearance of justice.*" *Offutt v. United States,* 348 U.S. 11, 14.' "

See also Great Western Sugar Co. v. Nelson, 442 U.S. 92 (1979) (summarily vacating and remanding a Tenth Circuit order and opinion characterized as "admirable for its conciseness if not for its fidelity to our case law . . .").

The appearance of justice took a terrible beating in this case. Federal appellate courts should not be allowed to conduct their business in such an arbitrary and irrational fashion with impunity, insulated from oversight merely because the issues involved are not intrinsically cert-worthy. Their status as courts of last resort in more than 90% of federal cases must not be utilized to render the right of appeal illusory. Here a litigant was wrongfully deprived of its constitutional right to trial by jury and was then denied appellate review of that decision on absolutely indefensible grounds. The Court of Appeals' refusal to acknowledge an obvious and fundamental mistake is profoundly disturbing. The result below is an embarrassment to the system and should be summarily undone by this Court.

CONCLUSION

For the reasons stated the Petition for Writ of Certiorari should be granted; the judgment should be vacated and the cause remanded to the Tenth Circuit with instructions to consider petitioner's appeal on the merits.

Respectfully submitted,

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December 12, 1986

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 83-2036, 83-2085

Seismic International Research Corporation,
Plaintiff-Appellant/Cross-Appellee,

v.

South Ranch Oil Company, Inc.,
Defendant-Appellee/Cross-Appellant.

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. CIV-82-1093-E)

Filed June 3, 1986

C. Nelson Berry, III, of Thoreson, Yost, Berry & Matthews, Seattle, Washington, and Charles N. Berry, Jr., of Berry & Spooner, Oklahoma City, Oklahoma, for Plaintiff-Appellant/Cross-Appellee.

Daniel R. O'Neill of Bryan, Cave, McPheeters & McRoberts, St. Louis, Missouri (Michael G. Biggers of Bryan, Cave, McPheeters & McRoberts, St. Louis, Missouri, and Richard P. Hix of Doerner, Stuart, Saunders, Daniel & Anderson, Tulsa, Oklahoma, with him on the briefs), for Defendant-Appellee/Cross-Appellant.

Before McKAY and LOGAN, Circuit Judges, and CROW, District Judge.*

---

* Honorable Sam A. Crow, United States District Judge for the District of Kansas, sitting by designation.

McKAY, Circuit Judge.

This is an appeal from a final judgment in a breach of contract action. The plaintiff, Seismic International Research Corporation (SI), was formed by Stanley D. Brasel to provide consulting services and computer processing of geophysical data for the oil and gas industry. The defendant, South Ranch Oil Co., Inc. (SROC), was a general partner in numerous limited partnerships. It drilled oil and gas wells, operated drilling rigs, and developed drillable prospects.

SI entered into several contracts to perform seismological work for SROC. Some time later, SROC directed SI to stop work on the contracts and not to do anything more for SROC that would cost SROC any more money. Thereafter, SI sued SROC for its failure to pay the remaining balances due under the contracts. SROC countersued for recovery of amounts already paid. While this suit was pending, Mr. Brasel died. The dispute proceeded to a jury trial in which SI prevailed and was awarded $239,334.56. SI appeals from two post-trial orders: one denying SI's motion for attorney's fees and another denying SI's motion to compel assignment of certain royalty interests to the estate of its deceased president, Mr. Brasel. SROC cross-appeals the denial of certain jury instructions, the imposition of certain discovery sanctions, and the denial of a directed verdict. We first consider SROC's contentions.

I.

SROC claims that the trial court committed reversible error because it refused to instruct the jury on SROC's claim for tortious interference with a fiduciary relationship. SROC bases its tort claim on an undisclosed $28,000 payment that SI made to Norman Stafford, an SROC employee. Mr. Stafford was SROC's only geophysicist. He was assigned to monitor SI's

performance and to approve bills for its work. SROC claims that the $28,000 payment was a kickback designed to induce Mr. Stafford to approve SI bills even though work was not properly completed. SI admits it made the $28,000 payment, but contends the payment was a sales commission for Mr. Stafford's help in locating a buyer for SI's field crews.

The record indicates the trial court's reason for refusing to instruct on the tort claim. SROC anticipated the claim well before trial; it is mentioned in SROC's First Amended Answer and Counterclaims. Record, vol. 3, at 594. SROC's attorneys, however, failed to submit the tort-claim instructions to the court three days before trial, as required by the Order at Pretrial. *See* Record, vol. 1, at 48 (Order at Pretrial). Instead, they submitted the instructions the day the trial began. The court ruled that this submission was too late, and entered a minute order denying SROC's motion to add the tort-claim instructions because of "failure to adhere to Local Rule 14." Record, vol. 4, at 931; vol. 9, at 551.

SROC strenuously argues that it presented sufficient evidence for the court to instruct on its tort claim. But it does not argue that the court misapplied Local Rule 14 or abused its discretion in denying the instructions because they were filed late. Indeed, no mention of Local Rule 14 is made in the briefs. Counsel's failure to focus on the reasons the trial court denied the requested instructions leaves us without a basis for assigning error to the trial court's decision.

II.

SROC further argues that the district court committed reversible error by instructing the jury that SROC was bound by Norman Stafford's actions and omissions. SROC argues specifically that the court created this impression through its instructions on four doctrines of contract modification: waiver, oral modification, interpretation by conduct, and ratification.

SROC does not appear to allege that the instructions themselves misstate relevant law. Rather, it argues that the jury was not fully informed that SROC should not have been bound by an allegedly bribed employee. In essence, SROC argues that the trial court should have supplemented the contract-modification instructions with an explanation of how the $28,000 payment to Mr. Stafford affected SROC's contractual obligations.

Considering the jury instructions as a whole, *see, e.g., McGrath v. Wallace Murray Corp.*, 496 F.2d 299, 301 (10th Cir. 1974), we do not believe that the jury was misled. The contract modification instructions were accompanied by a good-faith instruction informing the jury that each party had an implied obligation under the contract "to act in good faith and with fair dealing." Record, vol. 4, at 950. This instruction informed the jury that it could find SI to have breached its contract if the jury accepted SROC's kickback argument. Furthermore, counsel for SROC had ample opportunity to comment during closing argument on the court's instructions on waiver, oral modification, interpretation by conduct, and ratification. Indeed, SROC's attorney did so, explaining that Mr. Stafford's receipt of the undisclosed $28,000 payment should affect the jury's application of the contract-modification doctrines. *See* Record, vol. 9, at 529-30. Therefore, we do not believe the court erred in refusing to supplement the instructions that dealt with contract modification.

III.

SROC also argues that the district court erred in instructing the jury that SROC had to prove a material breach to recover on its contract counterclaims. This argument apparently refers to jury instruction number 10, which contains the phrase: "[I]n order to prevail upon its claim, the defendant must prove that the plaintiff's performance was neither in literal compliance with the contract nor in substantial compliance with the contract." Record, vol. 4, at 951. SROC states that the instruction

was given in error because it prevented SROC from recovering damages "for whatever breaches it was able to prove." Appellee's Brief at 37.

Jury instruction number 10 was not given in error. That instruction was a correct statement of the law where a party seeks to excuse its performance altogether. *See Joyce v. Davis,* 539 F.2d 1262, 1266 (10th Cir. 1976); *Kole v. Parker Yale Development Co.,* 536 P.2d 848, 849-50 (Colo. App. 1975). Moreover, instructions 11 and 12 properly informed the jury as to the amount of damages that should be recovered. They stated that where a party has substantially, but not literally, complied with its contractual obligations, the proper measure of damages is the contract price less the cost of completing performance. In other words, those instructions informed the jury that it could award damages for any breaches it found. Because jury instructions must be considered as a whole in connection with all other instructions given, *see, e.g., McGrath,* 496 F.2d at 301, SROC's argument that instruction number 10 misled the jury is without merit.

IV.

In addition, SROC argues that the trial court abused its discretion when it orally issued a protective order in favor of SI. The order prevented SROC from copying "vector scan" work which SI had allegedly done for SROC. The court entered the order because counsel for SROC had earlier misrepresented to the court that it had been granted relief from the Pretrial Order. The court later commented on its decision when it denied a motion to reconsider the protective order:

> MR. BERRY [counsel for SI]: Yes, your Honor. If you will recall, your Honor, there was a problem with the representation made about an order that the Court made. When you came from your chambers—

> THE COURT: A lawyer from St. Louis that flat either lied to me or hadn't done his homework. Yes, I remember it very well.
>
> MR. BERRY: And when you came from your chambers, your Honor, you said—
>
> THE COURT: I said whatever other motions you have got, I'm going to hold adversely to his position just as sort of a penalty for misleading or attempting to mislead the Court. Yes, that lawyer just flat misstated what the court had ordered in a prior [ruling].

Record, supp. vol. 8, at 9.

The record indicates that the court did not carefully weigh the severity of the penalty imposed by the sanction against the harm produced by the misstatement of SROC's counsel. Sanctions under Rule 16(f) or preexisting common law should be entered only after a careful consideration of both the misleading activity by counsel and the severity of the punishment imposed by the sanctions. *See Joplin v. Southwestern Bell Telephone Co.*, 671 F.2d 1274, 1276 (10th Cir. 1982) (dismissal for failure to file pretrial statement). Moreover, a court should, when possible, enter sanctions against counsel, and not the parties they represent. *See Herzfeld & Stern v. Blair*, 769 F.2d 645, 647 (10th Cir. 1985).

Despite the court's apparent failure to employ a balancing test, we do not believe its decision to prohibit SROC from copying the "vector scan" documents is reversible error. SROC had the opportunity to inspect the documents and subpoena them for trial. Indeed, SI made the "vector scan" documents available for inspection. *See* Record, vol. 1, at 59. Because SROC had access to these documents, the trial court's sanctions, though not carefully weighed at the time they were imposed, constitute harmless error. *See* Fed. R. Civ. P. 61; *Nulf v. International Paper Co.*, 656 F.2d 553, 561 (10th Cir. 1981)

("Errors which could not have prejudiced the unsuccessful party afford no right of reversal of the judgment.").

V.

Finally, SROC argues that a directed verdict should have been granted in its favor. Applying our stringent standard for granting such a motion, we are unable to say—after viewing all the evidence in the light most favorable to SI, the nonmoving party—that the case should have been removed from the jury in this strongly contested trial. *See Sharon Steel Corp. v. Lakeshore, Inc.*, 753 F.2d 851, 853-54 (10th Cir.), *cert. denied sub nom. Prudential Federal Savings and Loan Association v. Equal Employment Opportunity Commission*, 106 S. Ct. 312 (1985).

VI.

In its appeal, SI argues that the trial court erred in refusing to order SROC to convey certain overriding royalty interests to the estate of Stanley D. Brasel. SI's claim is based on the judgment of the jury in favor of SI for the full amount claimed on the Northwest Oklahoma contract. That contract was accompanied by an "Agreement of Contract and Services," which stated that SROC would convey the royalty interests directly to Mr. Brasel. Record, vol. 6, plaintiff's exhibit 2. Although SI prevailed its contract claim, the trial court denied SI's request for specific performance of the agreement to convey those interests to the estate of Mr. Brasel. This denial was based on the trial court's apparent judgment that Mr. Brasel was a party to the contract and that his estate thus had to bring suit directly to receive payment of the royalty interests. *See* Record, supp. vol. 9, at 7.

We reject the trial court's position. Because we have the contract before us, we are not limited to reviewing under the "clearly erroneous" standard the trial court's apparent determination

that Mr. Brasel was a party to the contract. *See Southwestern Stationery & Bank v. Harris Corp.*, 624 F.2d 168, 170 (10th Cir. 1980). The document indicates that, although Mr. Brasel signed the "Agreement of Contract and Services," he did so in the space designated for the representative of SI (just as SROC's representative signed in the corresponding space designated for SROC). No other individual signed for SI. *See* Record, vol. 6, plaintiff's exhibit 2. Indeed, the document's title indicates Mr. Brasel's representative capacity. It reads, "Agreement of Contract and Services by Stan D. Brasel, Consultant & President of Seismic International Research Corp." *Id.* Because Mr. Brasel signed the contract in his representative capacity, SI could properly bring suit directly for the estate of Mr. Brasel as a third-party beneficiary.[1] We see no reason that his estate had to be joined directly as a party in order to receive relief. *See* Fed. R. Civ. P. 17(a); *Prudential Oil & Minerals Co. v. Hamlin*, 277 F.2d 384, 387 (10th Cir. 1960); *cf. P & M Vending Co. v. Half Shell of Boston, Inc.*, 41 Colo. App. 78, ____, 579 P.2d 93, 95 (1978) ("[E]ven if the contract involved here was entered into for the benefit of plaintiff's parent corporation, plaintiff was a real party in interest entitled to bring the action without joining its parent corporation."). Therefore, we hold the trial court erred in failing to grant SI's equitable claim seeking specific performance of SROC's agreement.

VII.

SI also seeks an award of attorney's fees under Colo. Rev. Stat. §§ 13-17-101, -102 (Cum. Supp. 1985), which provides for such an award against a litigant whose claims are frivolous or

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[1] Counsel for SI confused the issue by misstating to the court that it had not alleged that it was bringing suit on behalf of the estate of Mr. Brasel. *See* Record, supp. vol. 9, at 6. SI, however, stated in its pleadings that it was suing "to assign Stan Brasel, or his assigns, overriding interests in the leases" that were the subject of the Northwest Oklahoma contract. *See* Record, vol. 1, at 2.

groundless. First, SI charges that SROC's claim of fraudulent inducement warrants an attorney's fee award. SROC, however, dropped this claim before trial when discovery produced a document that apparently affected SROC's view of this issue. *See* Record, vol. 4, at 873. We hold that this claim was voluntarily dismissed within a reasonable time after discovery of the document; thus Colo. Rev. Stat. § 13-17-102(5) (Cum. Supp. 1985) precludes an attorney's fee award based on this claim.

Second, SI argues that SROC brought frivolous or groundless claims when it joined Mr. Brasel and when it alleged that SI and Mr. Brasel breached their fiduciary duties. SI, however, falls far short of demonstrating that these claims were "not supported by any credible evidence at trial," or that there was "no rational argument based on the evidence or law" to support these claims. *Western United Realty, Inc. v. Isaacs,* 679 P.2d 1063, 1069 (Colo. 1984) (en banc). We are not persuaded by mere assertions in SI's brief that SROC exercised bad faith or that it made no attempt to determine the sufficiency of its evidence. *See* Appellant's Brief at 18-19. SI makes no citation to the record regarding the absence of merit of SROC's claims against Mr. Brasel or of its breach-of-fiduciary-duty claim. *See id.* at 18-20. (SI did point out that SROC dropped its claims against Mr. Brasel after the evidence was presented at trial, *id.* at 18-19, but this fact does not prove that the claims were meritless: SROC may have dismissed its claims against Mr. Brasel for tactical reasons unrelated to the merits of the claims.) Thus, SI does not demonstrate that the trial court erred in denying attorney's fees on SROC's claim against Mr. Brasel and on its claims that SI and Mr. Brasel breached their fiduciary duties.

Finally, SI asserts that SROC brought a groundless or frivolous claim when it charged that SI induced Mr. Stafford to breach his fiduciary duty by paying him $28,000. We reject this argument as patently flawed. Even though procedural errors of SROC's counsel kept SROC from pursuing this claim at trial, *see supra,* part I, the claim was supported by "credible

evidence." *See Western United Realty,* 679 P.2d at 1069-70. SI did not deny that it made an undisclosed $28,000 payment to Mr. Stafford when he was approving SI's contract work for SROC. Thus the claim was not frivolous or groundless.

AFFIRMED IN PART AND REVERSED IN PART.

APPENDIX B

SEPTEMBER TERM - September 18, 1986

Before Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha, Honorable Bobby R. Baldock, Circuit Judges and Honorable Sam A. Crow, District Judge*

Nos. 83-2036, 83-2085

Seismic International Corporation,
Plaintiff-Appellant, Cross-Appellee,

vs.

South Ranch Oil Company,
Defendant-Appellee, Cross-Appellant.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard. Judge Logan voted to grant rehearing.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule

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*Of the United States District Court for the District of Kansas sitting by designation.

35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Judges Holloway and Seymour did not participate.

/s/ ROBERT L. HOECKER,
Clerk

APPENDIX C

RULE 14

MOTIONS, APPLICATIONS AND OBJECTIONS

(a) **Briefs.** Each motion, application or objection shall set out the specific point or points upon which the motion is brought and shall be accompanied by a concise brief. Each party opposing the motion, application or objection shall, within fifteen (15) days after the same is filed, file with the Clerk and serve upon all other parties a response which shall be supported by a concise brief if the motion, application or objection is opposed. Any motion, application or objection which is not opposed within fifteen (15) days, as set out above, shall be deemed confessed. The Court may, in its discretion, shorten or lengthen the time in which to respond. The original and one copy of each motion, application or objection shall be deposited with the Clerk. No brief shall be submitted which is longer than twenty (20) typewritten pages without special permission of the Court. Oral arguments on motions, applications or objections will not be conducted unless ordered by the Court.

(b) **Summary Judgment Motions.** The brief in support of a motion for summary judgment (or partial summary judgment) shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be numbered and shall refer with particularilty to those portions of the record upon which movant relies. The brief in opposition to a motion for summary judgment (or partial summary judgment) shall begin with a section which contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary

judgment unless specifically controverted by the statement of the opposing party.

(c) **Motions Not Requiring Briefs.** No brief is required by either movant or respondent unless otherwise directed by the Court, with respect to the following motions: (1) for extension of time for the performance of an act required or allowed to be done, provided request therefor is made before the expiration of the period originally prescribed, or as extended by previous orders; (2) to continue a pretrial conference, hearing or motion, or the trial of an action; (3) to amend pleadings; (4) to file supplemental pleadings; (5) to appoint next friend or guardian ad litem; (6) for substitution of parties; (7) motions to compel answers to interrogatories; and (8) motions for physical or mental examination. Any of the above motions not requiring briefs shall be accompanied by a proposed order stating the relief requested by said motion.

(d) **Brief with Motion, Application or Objection.** The Clerk shall not accept for filing any motion, application or objection requiring a brief, unless accompanied by such brief, without permission of the Court.

(e) **Conference of Attorneys with Respect to Motions or Objections Relating to Discovery.** With respect to all motions or objections relating to discovery pursuant to Rules 26 through 37, Federal Rules of Civil Procedure, this Court shall refuse to hear any such motion or objection unless counsel for the movant shall first advise the Court in writing that he has conferred in good faith with opposing counsel, but that, after a sincere attempt to resolve differences has been made, the attorneys have been unable to reach an accord.

(f) **Motions in Criminal Cases.** Motions in criminal cases, and particularly motions made pursuant to Rules 7(f), 12, 16, 21 and 41(e), Federal Rules of Criminal Procedure, shall be in writing and state with particularity the grounds therefor and the relief or order sought. All such motions shall be filed with the

Clerk within ten (10) days after arraignment, and a copy served upon the United States Attorney, who shall respond within five (5) days after filing, unless a different time is fixed by statute or the Federal Rules of Criminal Procedure for such motions or responses thereto. All motions and responses thereto must be accompanied by a concise brief citing all authorities upon which the movant or respondent relies. The Court may, however, in its discretion, order or allow such motions or responses thereto to be filed at a time earlier than or later than that fixed by this Rule.

(g) **Motions to Reconsider or Overrule Orders Issued by Judges of This District.** Once a motion or application has been presented and an order entered by a Judge sitting in this District, a motion to reconsider or overrule said order shall be presented only to the Judge entering the order or to the other active judges sitting en banc. A unanimous vote of the other active judges sitting en banc will be required to overrule such order previously entered. The movant or applicant shall make known the action taken by the Judge to whom it was previously submitted.

(h) **Applications for Extensions of Time.** All applications for extensions of time for the performance of an act required or allowed to be done shall state: (1) the date the act is due to occur without the requested extension; (2) whether previous applications for extensions have been made to include the number, length of extension, or other disposition of them; and (3) whether the opposing counsel or party agrees or objects to the requested extension.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED
MAR 8 1983
HERBERT T. HOPE
CLERK, U. S. DISTRICT COURT
BY _____ DEPUTY

SEISMIC INTERNATIONAL RESEARCH CORPORATION, Plaintiff, vs. SOUTH RANCH OIL COMPANY, INC., Defendant, vs. SEISMIC INTERNATIONAL RESEARCH CORPORATION, Counterclaim Defendant, and BARBARA BRASEL, PERSONAL REPRESENTATIVE OF THE ESTATE OF STANLEY D. BRASEL, DECEASED, Counterclaim Defendant.	No. CIV-82-1093-E

DEFENDANT'S PROPOSED INSTRUCTIONS

Comes now defendant South Ranch Oil Company, Inc. and submits its proposed instructions, exclusive of "boilerplate". Defendant's discovery is still continuing and it has not seen the proposed instructions by opposing parties and South Ranch reserves the right to supplement or modify these instructions.

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Attorneys for Defendant and
Counterclaimant

Certificate of Service

I hereby certify that copies of the foregoing were mailed with proper postage thereon fully prepaid, this 8th day of March, 1983, to counsel of record for counterclaim defendants Seismic International Research Corporation and Barbara Brasel, Personal Representative of the Estate of Stanley D. Brasel, Deceased.

Daniel R. O'Neill

Defendant's Proposed Instruction No. _____

If you find that Seismic or Brasel or both of them intentionally interfered with the employment relation between South Ranch and Henry Saulnier or between South Ranch and Norman Stafford without justification of a right equal to or superior to the rights of South Ranch in its relations to its employees, you may award South Ranch damages.

Authority

Watson v. Settlemeyer, 372 P.2d 453 (Colo. 1962); *Order of Railway Conductors v. Jones,* 239 P.882 (Colo. 1925).

Defendant's Proposed Instruction No. _____

If you find that counterclaim defendants Seismic and the Estate of Stanley Brasel are liable for intentional Interference with the employment relation(s) between South Ranch and Saulnier or between South Ranch and Stafford, and the rights of South Ranch injured have no ascertainable market value, you may award damages equal to the actual losses sustained by South Ranch as a direct and proximate result of Seismic and Brasel's actions.

Your award may include damages for net profits resulting from moneys paid to third party Seisdata as a result of Seismic's actions.

Authority

Dandrea v. Board of County Commissioners of El Paso County, 356 P.2d 893 (Colo. 1960);
57 CJS *Master and Servant* §628;
Lee v. Durango Music, 355 P.2d 1083 (Colo. 1960);
Power Equipment Company v. Fulton, 513 P.2d 234 (Colo. App. 1973).

Defendant's Proposed Instruction No. _____

In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrongdoers for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If you should find that Seismic or Brasel or both acted with malice or with intent to injure South Ranch when interfering with its employment relation with Saulnier or Stafford or both, you may, in addition to awarding actual damages, award an additional amount as exemplary damages.

Authority

Order of Railway Conductors v. Jones, 239 P.882 (Colo. 1925)

Defendant's Proposed Instruction No. _____

Malice may be found from reckless and wanton acts of the injuring party such as indicate utter disregard of consequences, aside from any intentional malice in its odious or malevolent sense.

Authority

Carlson v. McNeil, 162 P.2d 226 (Colo. 1945).

Defendant's Proposed Instruction No. _____

You may find that there was a joint venture between South Ranch and Seismic or South Ranch and Brasel or South Ranch and both of them if all three of the following criteria are shown:

(1) a joint interest in the geological prospects (property) by South Ranch and Seismic or South Ranch and Brasel or South Ranch and both of them,

(2) agreement(s), express or implied, to share the profits and losses of the venture, and

(3) conduct showing cooperation in the project.

Authority

Hall v. State Compensation Insurance Fund, 387 P.2d 899 (Colo. 1963);
Wolfe v. Jensvold, 539 P.2d 1299 (Colo. App. 1975).

Defendant's Proposed Instruction No. _____

Each joint venturer has a duty to make full, fair, open and honest disclosure to his colleagues concerning everything affecting the relationship, including matters which have induced them to enter into the relationship. If you find that South Ranch and Seismic or South Ranch and Brasel or South Ranch and both of them were joint venturers and Seismic or Brasel or both failed to fully, fairly, openly and honestly disclose to South Ranch everything concerning (1) Seismic's payment of $28,000 to Mr. Stafford, or (2) Seismic's capability of producing drillable geological "prospects" for South Ranch, or (3) Seismic's capability of producing unique computerized geological and geophysical data maps which would provide a complete rationale for the designation of a particular parcel of land as a "drillable prospect" and which would assist South Ranch in evaluating and marketing Oil and gas "prospects" or (4) Seismic's geological and geophysical experience, manpower and financial backing to develop fifty or more "drillable prospects" by June 1, 1981, then you must enter a verdict for South Ranch against Seismic or the Estate of Stanley Brasel or both.

Authority

Lucas v. Abbott, 601 P.2d 1376 (Colo. banc 1979);
Kincaid v. Miller, 272 P.2d 276 (Colo. banc 1954).

Defendant's Proposed Instruction No. _____

If you find that Seismic or Brasel or both of them breached their (its) fiduciary duty as a joint venturer to South Ranch, you

may award South Ranch damages equal to the amount of any payments made to Seismic or Brasel or both or an amount equal to any lost by South Ranch as a result of the breach of fiduciary duty.

Authority

Kincaid v. Miller, 272 P.2d 276 (Colo. banc 1954);
Kane v. McNally, 470 P.2d 73 (Colo. banc 1970);
Gundelach v. Gollehon, 598 P.2d 521 (Colo. App. 1979).